SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

CREATIVE MOBILE TECHNOLOGIES, LLC,	*	
Plaintiff,	*	
	*	2012 CA 6873 B
v.	*	Judge Laura A. Cordero
	*	
DISTRICT OF COLUMBIA, *et al.*,	*	
Defendants.	*	

ORDER DENYING PLAINTIFF'S EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Before the Court is Plaintiff's Emergency Motion for Temporary Restraining Order and Preliminary Injunction ("Plaintiff's Motion"), filed August 22, 2012. Defendant filed an Opposition to this Motion on August 23, 2012. A hearing on this Motion was held on August 24, 2012. On August 23, 2012, RideCharge, Inc. filed a Motion to Intervene as Plaintiff, to File a Complaint and to Join Plaintiff's instant Motion. For the reasons stated below, Plaintiff's Motion is **denied without prejudice**. RideCharge, Inc.'s Motion to Intervene is **denied as moot.**

1. BACKGROUND

This Motion and Complaint arise out of a dispute between Plaintiff and Defendants regarding the installation of new meters in D.C. taxis. Plaintiff contests the rejection of its bid to perform this work and filed a protest on July 19, 2012 challenging its "exclusion from the competitive range and the award of the contract to Verifone." Mot. at 3. Pursuant to D.C. Code § 2.360.08(c)(1), this protest triggered an automatic stay of performance of the contract. The District of Columbia announced a public hearing on "newly-adopted regulations to implement" the installation of the meters on July 27, 2012. *Id.* On July 31, 2012, the D.C. Taxi Commissioner executed Determination & Findings ("D&F") concluding that immediate

performance of the contract was necessary despite the protest stay. *Compl.* at 5. This D&F was signed by the District of Columbia's Chief Procurement Officer ("CPO"). *Id.* Plaintiff timely challenged the D&F with the Contract Appeals Board ("CAB") on August 8, 2012. *Id.* CAB Judge Parchment indicated to the parties on August 3, 2012 that the Board would rule on the validity of the D&F by August 31, 2012. *Id.* The District of Columbia announced on August 20, 2012 that it would proceed with the installation of the Verifone's meters on August 22, 2012. *Id.* Plaintiff then filed this Motion seeking a ten day temporary restraining order and injunctive relief to prevent any installation of Verifone's meters until Judge Parchment of CAB rules on the validity of the D&F.

2. JURISDICTION

In their Opposition and at the hearing, Defendants challenged the Court's jurisdiction to rule on this Motion. Def. Opp'n at 5. Defendants argue that because D.C. Code § 2-360.03(1) states that the CAB is the exclusive hearing tribunal for the protest of a solicitation or award of a contract, this Court cannot rule on this Motion until the CAB reaches a decision on Plaintiff's protests. *Id.* at 4. However, the Court of Appeals held otherwise in *District of Columbia v. Group Insurance Administration*. *See* 633 A.2d 2 (D.C. 1993). In that case, the Court of Appeals held that the Superior Court of the District of Columbia, under the All Writs Act, had authority "albeit in rare circumstances, to issue emergency relief pending the resolution of agency proceedings." *Id.* at 14. Thus "the Superior Court must . . . have the power to issue emergency relief pending the completion of administrative proceedings in cases where, in the first instance, review would lie in the Superior Court." *Id.* The Court of Appeals further explained that "because the Superior Court has jurisdiction to review the CAB's decisions in bid protests . . . the Superior Court also possesses the power under the All Writs Act to issue

temporary relief to a disappointed bidder even though the CAB has not yet issued a decision." *Id.* However, the Court of Appeals also noted that the Superior Court's power to issue emergency relief does not give "it the authority to function as a competitor to the CAB" and that the "Superior Court still owes the CAB deference as the primary fact-finder." *Id.* at 16. Therefore, this Court has jurisdiction to decide the instant Motion.

3. PLAINTIFF IS NOT ENTITLED TO A TEMPORARY RESTRAINING ORDER OR A PRELIMINARY INJUNCTION

The Court of Appeals has held that "the decision to grant or deny preliminary injunctive relief is committed to the sound discretion of the trial court." *Zirkle v. D.C.*, 830 A.2d 1250, 1255 (D.C. 2003) (citing *Stamenich v. Markovic*, 462 A.2d 452, 456 (D.C. 1983)). A proper exercise of this discretion requires the trial court to consider whether the moving party has clearly demonstrated:

> that there is a substantial likelihood that he will prevail on the merits; (2) that he is in danger of suffering irreparable harm during the pendency of the action; (3) that more harm will result to him from the denial of the injunction than will result to the defendant from its grant; and, in appropriate cases, (4) that the public interest will not be disserved by the issuance of the requested order."

Id. (citing *Wieck v. Sterenbuch*, 350 A.2d 384, 387 (D.C. 1976).

In considering a motion for preliminary injunction, "the most important inquiry is that concerning irreparable injury." *Wieck*, 350 A.2d at 387. The *Wieck* Court noted that "an injunction should not be issued unless the threat of injury is imminent and well-founded . . . ." *Id.* Furthermore, speculation "is insufficient to demonstrate a need for immediate equitable relief." *Id.* Mere economic harm is also insufficient to make out a claim of irreparable harm. *See Zirkle*, 830 A.2d at 1256. "The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Id.*

In the instant case, Plaintiff has not "clearly demonstrated" that it will be in danger of suffering irreparable harm if Defendants are not prevented from installing meters in the next ten days. Plaintiff's main argument that it will suffer irreparable harm is that if Defendants are able to install meters before Judge Parchment issues her decision on August 31, 2012, "the presence of that equipment, as well as the excessive cost of its removal and replacement, may prevent the Board from being able to fashion relief that would allow for the competition to be reopened and the contract awarded fairly as contemplated by the original solicitation." Mot. at 6. However, evidence presented at the hearing on August 24, 2012 showed that very few meters are currently being installed and will be installed in the next five business days. Furthermore, there is no indication that any expense in removing Verifone meters, if this relief is indeed ordered by the CAB, would be borne by Plaintiff. As noted above, speculation about the effect of the installation of Verifone meters on the CAB's decision cannot create a claim of irreparable harm.

Plaintiff also argued in its Motion that it will suffer irreparable harm because it will "be deprived of its right and opportunity to obtain meaningful administrative review of the CPO's D&F." Mot. at 6. At the hearing, Plaintiff framed these arguments as threats to its due process rights. However, there is no indication that the CAB would fail to fashion a remedy that upholds a fair, competitive procurement system. In the past, the CAB has declared contracts void *ab initio* and has ordered that the bid protestors be granted the contract where it deemed it appropriate. *See Eagle Maintenance Services, Inc. v. DC CAB*, 893 A.2d 569, 575 (D.C. 2006) (stating that the CAB held the original contract void *ab initio*); *Protest of Health Right Inc., et al.*, 1997 DCBCA LEXIS 60,

CAB Nos. P-507, 510, and 511 (directing the contracting officer to negotiate contracts with DCHC, GW Health Plan, and Health Right). Therefore, Plaintiff has not demonstrated that its due process rights will be harmed by waiting for the CAB to issue appropriate relief. As Plaintiff has not "clearly demonstrated" irreparable harm, this factor weighs against it.

Additionally, Plaintiff has not shown that more harm will result to it by the denial of this Motion than will result to Defendants by its grant. As Plaintiff has failed to demonstrate any concrete harm that would result from the denial of this Motion, it cannot be said that more harm will result to Plaintiff than will result to Defendants. In their Opposition, Defendants also argue that they will suffer harm because there will be de-mobilization and re-mobilization costs if the Court grants this Motion. Def. Opp'n at 9. Therefore, this factor also weighs against granting Plaintiff's Motion.

Plaintiff argued in its Motion and at the hearing that granting its Motion is in the public interest. It argues that "there is a strong public interest in a strong and effective bid protest system," a "strong public interest in a fair, competitive procurement system," and that if taxi drivers must reinstall the new meters, this will "undermine the taxi cab industry's confidence . . . ." Mot. at 9. However, Plaintiff is already fully participating in the CAB process based on its bid protest and its challenge to the D&F. Moreover, Defendants argue that the new taxi meter installation is also in the public interest. Def. Opp'n at 8. Therefore, Plaintiff has not demonstrated that issuing the preliminary injunction would contravene the public interest, as required by law.

Finally, an analysis of the factor of likelihood of success on the merits does not aid Plaintiff. Plaintiff argues that it is likely to succeed on the merits of its pending

challenge to the D&F because the D&F does not contain the level of substantial evidence required for the CAB to uphold overriding the stay of statutory performance. Mot. at 7. Defendants argue that they have provided sufficient evidence to CAB of an urgent and compelling need to proceed with the contract award while the protest is pending. Def. Opp'n at 7. Defendant' filing before the CAB makes reference to the legislation enacted by the City Council and the emergency rules adopted by the Taxi Cab Commission. Given the limited information presented to this Court, likelihood of success on the merits cannot be determined on this record. More importantly, the factor of irreparable harm is "the most important inquiry." *Wieck*, 350 A.2d at 387. Without the requisite showing that Plaintiff will suffer irreparable harm, the Court cannot grant Plaintiff the relief requested.

As the factors considered by the Court in its discretion when considering a motion to a temporary restraining order or preliminary injunction weigh against Plaintiff, Plaintiff has not made the requisite showing to obtain the relief they seek.

Finally, the Court will deny RideCharge Inc.'s Motion to Intervene as Plaintiff, to File a Complaint and to Join Plaintiff's Motion as moot. RideCharge, Inc. argues that it should be permitted to intervene because it is competing with Plaintiff for the contract. Mot. to Intervene at 5. However, RideCharge, Inc. notes that it is in similar position to Plaintiff in challenging Defendants' actions. *Id.* RideCharge, Inc's Complaint for Temporary Restraining Order, Injunctive Relief and Declaratory Relief, attached as Exhibit A to RideCharge, Inc's Motion to Intervene, does not raise any arguments different from those made by Plaintiff. RideCharge, Inc. argues that it will suffer "irreparable harm, as the Board will not be able to order a directed award to RideCharge,

Inc. or re-competition in which RideCharge, Inc. can fairly compete for the award." Ex. A. to Mot. to Intervene at. 7. It argues that it will be deprived of the opportunity to perform the contract and "other damages, for which there is no adequate remedy at law, such as the ability to cite the performance of the contract as past performance in future competitions." *Id.* However, this argument is speculative and does not differ from Plaintiff's contention that the presence of Verifone meters will prevent the CAB from fashioning suitable relief. Therefore, as noted above, this argument is not sufficient to create a claim of irreparable harm.

4. CONCLUSION

Wherefore, it is this 27th day of August, 2012, hereby:

ORDERED, that Plaintiff's Emergency Motion for Temporary Restraining Order and Preliminary Injunction is **DENIED WITHOUT PREJUDICE**; and it is further

ORDERED, that RideCharge Inc.'s Motion to Intervene as Plaintiff, to File a Complaint, and to Join Creative Mobile Technologies, LLC's Emergency Motion for Temporary Restraining Order and Preliminary Injunction is **DENIED AS MOOT**; and it is

FURTHER ORDERED, that the case is **CLOSED**.

SO ORDERED.

Laura A. Cordero
Associate Judge
(Signed in Chambers)

Copies to:
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